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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MICHAEL E. BOYD, Plaintiff and Appellant, v. SOQUEL CREEK WATER DISTRICT, et al., Defendants and Respondents.	H041389 (Santa Cruz County Super. Ct. Nos. CV176348 & AP001748)

Plaintiff Michael Boyd, proceeding in propria persona, sued the Soquel Creek Water District (District) and the City of Santa Cruz (City) regarding expenditures on and advocacy of a proposed seawater desalination project. Boyd alleges that the District spent over $4 million advocating for the project between 2008 and 2012 and increased water rates in 2013, in part, to fund the project. Among other things, Boyd alleges the rate increase violated state constitutional constraints on taxation, while the expenditures violated his federal constitutional rights.

The City successfully moved for judgment on the pleadings and the District successfully moved for summary judgment. The trial court entered judgments in favor of the City and the District, from which Boyd now appeals. We will affirm the judgment in favor of the City. We will reverse the judgment in favor of the District and remand the matter to the trial court with directions.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. *Boyd*

Boyd is a resident of Soquel, California. His wife, nonparty Pat Paramoure Boyd, has a water service account with the District.

B. *The District's Search for an Alternative Water Supply*

The District's aquifers are over-drafted. The District has investigated various potential alternative sources of water including a joint project with the City to build a desalination facility. In connection with that potential joint desalination project, the District and the City entered into a Memorandum of Agreement to Create a Joint Task Force to Pursue the Feasibility of Construction and Operation of a Seawater Desalination Facility (Joint Agreement) in September 2007.

In the Joint Agreement, the District and the City agreed to create a joint task force to investigate the construction of a seawater desalination facility.[1] The Joint Agreement requires the District and the City to "contribute equal shares" toward the project. The District spent $4,248,216.27 on the desalination project between May 16, 2008 and December 7, 2012.

A draft Environmental Impact Report (EIR) was prepared for the proposed joint desalination facility. However, the Final EIR has not been certified, the proposed desalination project has not been approved, and no Notice of Determination under CEQA has been filed concerning the proposed project.

C. *Santa Cruz Measure P*

Boyd alleges that on November 6, 2012, voters in the City approved Measure P, a ballot measure requiring that City voters approve the plans for any desalination facility. Measure P allegedly provided that "no legislative action by the City that would authorize

[1] The District submitted a copy of the Joint Agreement in support of its motion for summary judgment.

or permit the construction, operation, and/or acquisition of a desalination project, or that would incur any bonded or other indebtedness for that purpose, shall be valid or effective unless such action is authorized by an affirmative vote of a majority of qualified electors in the City of Santa Cruz voting on the question at a statewide general, statewide primary, or regularly scheduled municipal election." Boyd further alleges that Measure P applies retroactively as of the date the measure qualified for placement on the ballot, July 2, 2012.

Boyd alleges that Measure P applies to and binds not only the City, but also the District "as an alleged agent of the City under the terms of [the Joint Agreement]" and as a "co-conspirator" with the City. No similar ballot measure regarding the District's funding of a desalination project has been placed on a ballot, let alone approved.

D. *The District's Rates and the 2013 Rate Increase*

The District has separate rates for single-family residential, multi-family residential, and commercial customers. The residential water quantity rates are tiered, meaning the price customers pay for water increases as they use more of the resource. Tiered rates are used to encourage customers to conserve water.

The District's Board of Directors stated its intent to adopt a resolution modifying water rates and service charges at regular meetings on December 11, 2012 and January 15, 2013. The District held a public hearing on the proposed rate increase on February 5, 2013. More than 45 days before that hearing, the District gave customers and property owners written notice of the proposed rate increase, the protest process, and the public hearing. At the hearing, the Board approved and adopted the rate increase.

The rate increase increased customers' bi-monthly service charge. With respect to water quantity rates, the rate increase altered both the tier structure and the rate charged for each tier. For example, prior to the rate increase, single-family residences were

charged a rate of $3.51 for the first four units[2] of water used (Tier 1), a rate of $6.70 for units 5 to 15 of water used (Tier 2), and a rate of $11.61 for units 16 and above (Tier 3). Immediately following the rate increase, single-family residences were charged a rate of $3.60 for the first six units of water (Tier 1), $5.80 for units 7 to 14 (Tier 2), $8.50 for units 15 to 30 (Tier 3), and $13.00 for units 31 and above (Tier 4).

In support of its motion for summary judgment, the District submitted the declaration of its Finance Manager, Michelle Boisen. She declared that "[f]unds from the Rate Increase will be used for District operations including the evaluation of alternative water sources and environmental review of the proposed desalination plant. The Rate Increase does not include funds to construct the proposed desalination plant."

Boyd's wife, Paramoure Boyd, submitted a protest to the rate increase. Boyd attached a copy of that protest to the complaint. In it, Paramoure Boyd protested that the rate increase constituted a new tax, and thus required voter approval under Proposition 26. She reasoned that "[t]he true but hidden purpose of the increases [is] so as to predetermine the approval of ratepayer subsidized debt financing incurred for a pro-desal project campaign activity which has understated [(]miss-informed [*sic*]the public of[)] the fact that two thirds of the proposed three year water rate and the service charge increases are for the Board's pet project." In the protest letter Paramoure Boyd "designate[d]" Boyd "as [her] agent for service in these matters."

E. ***Complaint and Proposed First Amended Complaint***

Boyd filed suit against the District and the City in March 2013. The complaint, much like Boyd's appellate briefs, is difficult to follow. We parse it as best we can.

Boyd's first cause of action, asserted against the District only, alleges that the 2013 rate increase violates Article XIII D, section 6, subdivision (b)(3) of the California Constitution (subdivision (b)(3)). Elsewhere in the complaint, in paragraphs not

[2] One unit is equal to 748 gallons of water.

incorporated into the first cause of action, Boyd alleges that "[the District's] monthly service charge is arbitrary and not tied to the actual costs of providing identified services to each meter; (2) [the District's] commodity charge tiers are not proportional to the costs of providing water service; and (3) [the District's] water budget structure is not proportional to the costs of providing water service and fails to achieve its stated purpose." In portions of the complaint not incorporated into the first cause of action, Boyd also alleges that the District's expenditure of $4,248,216 violated subdivision (b)(3).

The second cause of action, also asserted against the District, alleges that the District's unspecified "actions" violated Article XIII D, section 6, subdivision (b)(4) of the California Constitution (subdivision (b)(4)). In portions of the complaint not incorporated into the second cause of action, Boyd alleges (1) "[the District's] new rates require users to pay for services[,] desalination water supplies[,] they cannot receive in violation of section 6, subdivision (b), paragraph (4) of article XIII D" and (2) "the District[']s] expenditure of $4,248,216 was not within the definition of a water fee or charge and was already expended for the proposed desal project; therefore, this violated Art. XIII D, sect. 6(b) . . . (4)."

The third cause of action, asserted against only the District, alleges that "[t]he District's expenditure of $4,248,216 between May 16, 2008 to December 7, 2012 on the Desal project was not an exception within the definition of Article XIII C, section 1.; because these services '*exceed the reasonable costs to the local government of conferring the benefit*'; nor do the expenditures qualify as '*assessments and property-related fees imposed in accordance with the provisions of Article XIII D*'." (Italics in original.) Elsewhere in the complaint, in paragraphs not incorporated into the third cause of action, Boyd alleges that "[t]he District's expenditure of $4,248,216 . . . is a 'tax' subject to the requirements of Art. XIII C, sect. 1 . . . ."

The fourth and final cause of action is asserted against both the District and the City and is labeled "First Amendment, Due Process Violations, and 42 USC [§] 1983." In it Boyd alleges that, by virtue of Measure P, "any expenditure by the [District] and the City [on the desalination project after July 2, 2012] were [*sic*] in violation of Plaintiff's rights to free speech and procedural due process rights which Plaintiff alleges violated Plaintiff's federal civil rights under color of state law in violation of 42 [U.S.C. §] 1983." The fourth cause of action also contains the allegation that Boyd "was the victim of a civil conspiracy by Defendants to violate his civil rights." Boyd further alleges that "Defendants' alleged advocacy for sole sourcing new water supply for seawater desalination . . . has placed in jeopardy the health and welfare of unascertained customers whose water is contaminated by the toxic Chromium 6." The alleged connection between the proposed desalination project and Chromium 6 contamination is puzzling.[3]

The complaint also contains other allegations, which are not clearly tethered to any of the causes of action. For example, Boyd complains that the District provided notice of the public hearing on the proposed rate increase during the Christmas holiday. Boyd also alleges that the defendants failed to identify a "potentially feasible alternative that might avoid a significant impact" and that the proposed desalination project "is not the least cost environmentally preferred option." Finally, Boyd alleges that the District

[3] Boyd alleges: "[B]ecause of the [District's] failure to carry out its duty to prevent the over drafting of the Aromas Red Sands Aquifer[, where water contaminated with Chromium 6 has been detected,] the [District's] alleged advocacy for desal coupled with their [*sic*] alleged failure to declare an emergency and a water hook-up moratorium on new connections; this allegedly exacerbated the chromium 6 problem . . . allegedly adding to the $4,248,216 for desal advocacy the amount of damages of at least '$2.52 million' to the District's ratepayers that would have allegedly been avoided by Plaintiff and other like situated water ratepayers but for Defendant's alleged unlawful actions in unlawful alleged advocacy for their preferred water supply option, on matters that allegedly should be decided in an impartial unbiased manner based on the facts at hand by the voters." (Ellipsis in original.)

was required to file an application for extraterritorial services to the Local Agency Formation Commission (LAFCO) before purchasing desalination water supplies from the City.

The complaint seeks, among other relief, an injunction preventing the District from implementing the rate increase unless and until it is approved by voters; an injunction preventing the District from making any further expenditure on the desalination project unless and until it is approved by voters; damages equal to his share of the $4,248,216 already expended on the desalination project; and equitable damages from both defendants.

Boyd filed a motion to amend and a proposed first amended complaint in July 2013. The trial court denied Boyd's motion to amend on the ground that his proposed amendments failed to state a cause of action.

F. ***Defendants' Successful Motions, Entry of Judgments, and Appeal***

The District moved for summary judgment or, in the alterative, summary adjudication on February 14, 2014. The City moved for judgment on the pleadings on April 23, 2014.

The court held a hearing on both motions on May 20, 2014. After hearing argument, the court granted the District's motion for summary judgment and the City's motion for judgment on the pleadings and ordered that judgment be entered for defendants. The court did not address whether Boyd was entitled to leave to amend the complaint as to the City. Court entered judgment in favor of the City on June 2, 2014 and entered judgment in favor of the District on June 6, 2014. Also on June 6, 2014, the court filed a written order granting summary judgment to the District. Boyd timely appealed on July 7, 2014.

II. DISCUSSION

A. *General Rules of Appellate Review*

In conducting our appellate review, we presume that a judgment or order of a lower court is correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) " 'All intendments and presumptions are indulged to support [the judgment] on matters as to which the record is silent, and error must be affirmatively shown.' " (*Ibid.*) Therefore, a party challenging a judgment or an appealable order "has the burden of showing reversible error by an adequate record." (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574.) " 'A necessary corollary to this rule is that if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed.' " (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.) Thus, where the appellant fails to provide an adequate record as to any issue the appellant has raised on appeal, the issue must be resolved against the appellant. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.)

The appellant must also present argument supported by relevant legal authority as to each issue raised on appeal. " '[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration.' " (*People v. Stanley* (1995) 10 Cal.4th 764, 793 (*Stanley*).)

Boyd is not exempt from compliance with these rules because he is representing himself. A party who chooses to act as his or her own attorney " 'is to be treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys.' " (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1247.)

B. *Issues Raised on Appeal*

The trial court granted both motions on numerous grounds. On appeal, however, Boyd raises only four issues. As an initial matter, he accuses the trial court judge of bias. With respect to his claim against the City, he argues the trial court erred in concluding he

lacked standing. As to the District, he challenges the court's conclusions that the rate increase does not violate subdivisions (b)(3) and (b)(4) as alleged in counts 1 and 2.

C. *Judicial Bias*

Boyd contends the trial court exhibited bias during the hearing on defendants' motions. In support of that contention, Boyd—without citation to the record—identifies three comments the trial court made at the hearing. In the first comment, the court noted that he saw in the morning paper that "there's a meeting tonight" at the District. The court went on to explain that, because "[t]here's no environmental impact report to challenge," "the body that you should be dealing with will be meeting at 7:00 o'clock tonight at the Soquel Creek Water District." In the second comment on which Boyd relies, the court stated: "[t]here's no application pending before LAFCO. LAFCO doesn't fit in here as well. And I sat on the LAFCO board many years ago. This doesn't fit within that." Third, the court advised Boyd of its tentative ruling to grant defendants' motions and told him, "This is your opportunity to argue against my tentative ruling."

Boyd's claim of judicial bias fails for numerous reasons. First, Boyd forfeited the point by failing to cite the part of the record where the trial court made the complained-of statements. (*In re Marriage of Falcone & Fyke* (2012) 203 Cal.App.4th 964, 978.) Second, the opening brief cites no legal authority to support Boyd's claim, such that we may consider it waived. (*Stanley*, *supra*, 10 Cal.4th at p. 793 [" '[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration.' "].) Third, Boyd forfeited this claim of error by failing to raise it below. (See *People v. Farley* (2009) 46 Cal.4th 1053, 1110 [claim of judicial bias forfeited where not asserted below]; *Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal.App.4th 1210, 1218 ["owners did not preserve their claim of judicial bias for review because they did not object to the alleged improprieties and never asked the judge to correct remarks made or recuse himself"].) Finally, were we to reach the merits of

Boyd's judicial bias claim, we would reject it. We do not believe "[a] person aware of the facts might reasonably entertain a doubt that the judge [was] able to be impartial." (Code Civ. Proc., § 170.1, subd. (a)(6)(A)(iii).)

D. *Judgment on the Pleadings in Favor of the City*

1. *Standard of Review*

"The standard of review for a motion for judgment on the pleadings is the same as that for a general demurrer: We treat the pleadings as admitting all of the material facts properly pleaded, but not any contentions, deductions or conclusions of fact or law contained therein." (*Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281, 1298 (*Dunn*).) We will not, however, credit the allegations in the complaint where they are contradicted by facts that either are subject to judicial notice or are evident from exhibits attached to the pleading. (*Hill v. Roll Internat. Corp.* (2011) 195 Cal.App.4th 1295, 1300 (*Hill*).) We review de novo whether a cause of action has been stated as a matter of law. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) We do not review the validity of the trial court's reasoning, and therefore will affirm its ruling if it was correct on any theory. (*Hill, supra,* at p. 1300.)

"[I]t is an abuse of discretion to grant a motion for judgment on the pleadings without leave to amend ' "if there is any reasonable possibility that the plaintiff can state a good cause of action." ' " (*Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255, 260.) The appellant bears the burden of showing abuse of discretion and carries that burden by showing how the complaint can be amended to state a cause of action. (*Ibid.*)

2. *Boyd Lacks Standing to Sue the City*

As noted above, Boyd raises only one claim of error as to the court's order granting judgment on the pleadings to the City: he claims the trial court erroneously concluded that he lacks standing to sue the City. We perceive no error.

" 'Standing' derives from the principle that '[e]very action must be prosecuted in the name of the real party in interest . . . .' (Code Civ. Proc, § 367.) A party lacks standing if it does not have an actual and substantial interest in, or would not be benefited or harmed by, the ultimate outcome of an action." (*City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 59 (*Stewart*).) "[A] person who invokes the judicial process lacks ' "standing" if he [or she] . . . does not have a real interest in the ultimate adjudication because the actor has neither suffered nor is about to suffer any injury of sufficient magnitude reasonably to [en]sure that all of the relevant facts and issues will be adequately presented.' " (*Id*. at p. 60.)

The thrust of Boyd's claim against the City is that any expenditures on or advocacy of the desalination project after July 2, 2012 violated Measure P and his federal constitutional rights to free speech and due process. As we understand it, Boyd's theory is two-fold. First, he contends that by expending public funds to advocate for the desalination project, defendants compelled him to support that project in violation of his First Amendment right not to be compelled to speak. Second, he maintains the use of public funds to advocate for the desalination project is unconstitutional under *Stanson v. Mott* (1976) 17 Cal.3d 206.

Boyd lacks standing to assert his claim against the City because "[t]he complaint does not specify any actual or threatened action which would injure [Boyd] or violate [his] rights." (*Stewart*, *supra*, 126 Cal.App.4th at p. 60.) Indeed, the complaint does not allege any actual or threatened action by the City at all. It alleges only that "to the degree Defendants [*sic*] City of Santa Cruz . . . are [*sic*] involved in such advocacy[,] this also allegedly violates Plaintiffs First Amendment Rights also." But speculation that the City *might* be involved in advocacy of the desalination plant is not sufficient to allege actual or threatened action.

Even if Boyd had alleged that the City made expenditures on and advocated for the desalination project after July 2, 2012 (or has plans to do so), we would conclude he

lacks standing because that conduct is not injurious to Boyd or his rights. Boyd does not allege that he resides in the City, pays City taxes, or is registered to vote in the City. To the contrary, his complaint and its exhibits show he is a resident of Soquel. Thus, any improper expenditure of City funds cannot possibly have harmed Boyd, a nontaxpayer. (See *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1086 [taxpayers have standing to sue to prevent the illegal expenditure of municipal funds under Code of Civil Procedure section 526a]; *Reynolds v. City of Calistoga* (2014) 223 Cal.App.4th 865, 873 [nontaxpayer lacked standing to challenge alleged misuse of City funds under Civ. Proc. Code § 526a]).[4] To the extent that the City improperly expended funds on advocacy, Boyd has no constitutional claim based on that conduct because the City could not have used his funds. Finally, any violation of Measure P, which confers rights on City voters, could not have harmed Boyd, a nonresident, nonvoter.

Boyd contends he alleged standing in his proposed first amended complaint by alleging he pays the water bills issued by the District despite the fact that his wife is the customer of record. At best, that allegation indicates that the District expended funds it received from Boyd on the desalination project. But the fact remains that Boyd does not allege the City expended funds on the project, let alone any funds it received from him. Accordingly, we conclude the trial court correctly granted the City's motion on lack of standing grounds.

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[4] We recognize that Boyd does not assert a claim pursuant to Code of Civil Procedure section 526a. Nevertheless, cases addressing taxpayer standing under Code of Civil Procedure section 526a are instructive. In that context, "courts have liberally construed the standing requirements for taxpayers." (*Torres v. City of Yorba Linda* (1993) 13 Cal.App.4th 1035, 1047.) However, even for purposes of a claim under Code of Civil Procedure section 526a, "a plaintiff must establish he or she is a taxpayer to invoke standing . . . ." (*Torres*, *supra*, at p. 1047.)

3. *Boyd Fails to State a Claim Against the City*

We affirm the judgment in favor of the City for the additional reason that the complaint does not state a claim against it.[5] As discussed above, the complaint does not allege that the City engaged in any wrongful conduct. (*Okun v. Superior Court* (1981) 29 Cal.3d 442, 457 [cause of action failed to state a claim against any defendant where there was "no allegation of wrongful conduct by any of the defendant[s]"].) It merely suggests that the City *might* have engaged in wrongful conduct, which is insufficient.

The complaint contains the conclusory allegation that Boyd "was the victim of a civil conspiracy by Defendants to violate his civil rights, all actionable under 42 U.S.C. § 1983, to redress violations of federal laws committed by Defendants, i.e. to inter alia compel the enforcement of federal laws, for Plaintiff['s] and the public's interests, and to secure remedial relief for Plaintiff for damages caused by those violations." The complaint does not allege facts regarding the formation and operation of the conspiracy, the wrongful act or acts done pursuant to it, or the damage resulting from such acts. "Conspiracy is . . . a doctrine imposing liability for a tort upon those involved in its commission." (*1-800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 590.) To the extent Boyd seeks to hold the City liable for the District's violations of his federal rights under a civil conspiracy theory (*City of Monterey v. Del Monte Dunes at Monterey, Ltd.* (1999) 526 U.S. 687, 709 ["claims brought pursuant to [42 U.S.C.] § 1983 sound in tort"]), that attempt fails given the lack of well-pleaded factual allegations and our obligation to disregard conclusions of law contained in a complaint. (*Nicholson v.*

[5] The City raises this issue on appeal. Boyd responds that he "is alleging his equal protection and due process rights were violated by the City Defendants [*sic*] because even though Plaintiff paid the desalination facility tax in the City before and after the Proposition P election, he was disenfranchised from voting in the Proposition P election because he didn't reside in the City." Neither the complaint nor the opening brief refers to a "desalination facility tax" and the reply brief does not define that term. We find Boyd's response to be confusing and unpersuasive.

McClatchy Newspapers (1986) 177 Cal.App.3d 509, 521 ["bare legal conclusions, inferences, generalities, presumptions, and conclusions are insufficient" to state a cause of action based upon a conspiracy theory].)

The complaint also alleges that "at all times herein mentioned, each of the defendants sued herein was the agent and employee of each of the remaining defendants and was at all times acting within the purpose and scope of such agency and employment." The Supreme Court has described such allegations as "egregious examples of generic boilerplate." (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 134, fn. 12.) Where, as here, a complaint "does not allege [that] any conduct on [the defendant's] part caused any harm, loss or damage on the plaintiff['s] part," the addition of such boilerplate agency allegations "do not result in the complaint['s] stating a cause of action against" the defendant. (*Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 829.)

In sum, the complaint fails to state a cause of action against the City.

4. *Leave to Amend*

Boyd's appellate briefs do not address whether the trial court abused its discretion by granting the City's motion without providing him leave to amend. Based on our review of the complaint, the proposed first amended complaint, and Boyd's appellate briefs, we find no reasonable probability that Boyd could amend his complaint to state a viable cause of action against the City. Therefore, we conclude the trial court did not abuse its discretion in not granting leave to amend.

E. *Summary Judgment in Favor of the District*

1. *Standard of Review*

In reviewing an order granting summary judgment, we review the entire record de novo in the light most favorable to the nonmoving party to determine whether the moving and opposing papers show a triable issue of material fact. (*Addy v. Bliss & Glennon* (1996) 44 Cal.App.4th 205, 214.) "A defendant moving for summary judgment

has the burden of showing that a cause of action lacks merit because one or more elements of the cause of action cannot be established or there is a complete defense to that cause of action." (*Jones v. Wachovia Bank* (2014) 230 Cal.App.4th 935, 945 (*Jones*).) A defendant cannot "simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence," (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854, fn. omitted), but "*must* 'support[ ]' the 'motion' with evidence." (*Id.* at p. 855.) "The defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. The defendant may also present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence—as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing." (*Ibid.*) "If a defendant's moving papers make a prima facie showing that justifies a judgment in its favor, the burden of production shifts to the plaintiff to make a prima facie showing of the existence of a triable issue of material fact." (*Jones*, *supra*, at p. 945.)

2. *Proposition 218*

On appeal, Boyd challenges the trial court's conclusions that the District's rate increase does not violate subdivisions (b)(3) and (b)(4) of Article XIII D, section 6 of the California Constitution. Article XIII D was adopted in 1996 as part of Proposition 218. " 'Proposition 218 can best be understood against its historical background, which begins in 1978 with the adoption of Proposition 13. "The purpose of Proposition 13 was to cut local property taxes. [Citation.]" [Citation.] . . . [¶] To prevent local governments from subverting its limitations, Proposition 13 also prohibited counties, cities, and special districts from enacting any special tax without a two-thirds vote of the electorate. [Citations.] It has been held, however, that a special assessment is not a special tax within the meaning of Proposition 13. [Citation.] Accordingly, a special assessment could be imposed without a two-thirds vote.' " (*Apartment Assn. of Los Angeles County*,

Inc. v. City of Los Angeles (2001) 24 Cal.4th 830, 836-837.) The electorate adopted Proposition 218, which added articles XIII C and XIII D to the California Constitution, in part to address that loophole in Proposition 13. (*Id.* at p. 837.)

"Article XIII C imposes restrictions on general and special property taxes in addition to those imposed under article XIII A, and requires voter approval for any general or special tax imposed by a local governmental entity. . . . [A]rticle XIII D, is addressed to 'Assessment and Property-Related Fee Reform,' and it 'undertakes to constrain the imposition by local governments of "assessments, fees and charges." ' " (*Paland v. Brooktrails Township Community Services Dist. Bd. of Directors* (2009) 179 Cal.App.4th 1358, 1365.)

Subdivision (b) of section 6 of article XIII D imposes four limitations on fees and charges: "(1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service. [¶] (2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed. [¶] (3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel. [¶] (4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. . . ." Boyd contends that the District's increased water rates violate two of the foregoing limitations.

"We review questions of law about the meaning of Proposition 218 . . . de novo." (*Greene v. Marin County Flood Control and Water Conservation Dist.* (2010) 49 Cal.4th 277, 287.) "We exercise our independent judgment in reviewing whether the District's rate increase[] violated [Article XIII D,] section 6." (*Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892, 912; accord *City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926, 933; see *Silicon Valley Taxpayers' Assn. Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 450 ["courts should exercise their

independent judgment in reviewing whether assessments that local agencies impose violate article XIII D"].)

3. *Count 1*: *Article XIII D, Section 6, Subdivision* (*b*)(*3*)

On appeal, Boyd argues that the District's rate increase violates subdivision (b)(3) because the new tiered water rates do not correspond to the actual cost of providing service at a given level of water usage. He contends that the trial court's decision to the contrary is inconsistent with the Fourth Appellate District's decision in *Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493 (*Capistrano*). The District's position is that its rates satisfy the proportionality requirement set forth in subdivision (b)(3) because the rates (1) employ different user classifications (residential, multi-residential, and commercial); (2) are based on the amount of water used; and (3) encourage conservation as authorized under Water Code § 31035. The District submitted no evidence regarding the cost to it of providing water service or how it calculated the rates.

Subdivision (b)(3) provides: "A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements: [¶] . . . (3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel." To address Boyd's challenge, we must first determine the meaning of subdivision (b)(3). "The principles of constitutional interpretation are similar to those governing statutory construction. In interpreting a constitution's provision, our paramount task is to ascertain the intent of those who enacted it. [Citation.] To determine that intent, we 'look first to the language of the constitutional text, giving the words their ordinary meaning.' [Citation.] If the language is clear, there is no need for construction. [Citation.] If the language is ambiguous, however, we consider extrinsic

evidence of the enacting body's intent. [Citations.]" (*Thompson v. Department of Corrections* (2001) 25 Cal.4th 117, 122.)

The ordinary meaning of the word "proportional" is "having a size, number, or amount that is directly related to or appropriate for something." (Merriam-Webster.com (2016) <http://www.merriam-webster.com/dictionary> [as of 4/29/16].). The ordinary meaning of the phrase "attributable to" is "capable of being attributed or ascribed." (Oxford English Dict. Online (2016) <http://www.oed.com> [as of 4/29/16].) "Ascribe" means "to refer to a supposed cause, source, or author." (Merriam-Webster.com (2016) <http://www.merriam-webster.com/dictionary> [as of 4/29/16].) In view of the foregoing, we construe subdivision (b)(3) as requiring that a property-related charge not exceed an amount that is directly related to the cost of service caused by the parcel.

"[W]e may 'test our construction against those extrinsic aids that bear on the enactors' intent' [citation], in particular the ballot materials accompanying Proposition [218] that place the initiative in historical context." (*Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537, 560.) The Legislative Analyst's analysis of Proposition 218 informed voters that one of the measure's "proposed requirements for property-related fees" was that "[n]o property owner's fee may be more than the cost to provide service to that property owner's land." (Ballot Pamp. Gen. Elec. (1996) analysis of Prop. 218 by legislative analyst, p. 73, available at <http://repository.uchastings.edu/ca_ballot_props/1138>.) Thus, the ballot materials confirm that subdivision (b)(3) requires a nexus between a property-related charge (here, the water rate) and the cost of service associated with a parcel.

In view of the foregoing, compliance with Proposition 218 plainly requires a water district to charge customers based on the cost of providing water service to their parcel.[6]

[6] This is not to say that Proposition 218 compels a parcel-by-parcel proportionality analysis, something this court rejected in *Griffith v. Pajaro Valley Water Management* (continued)

(Accord *Capistrano, supra*, 235 Cal.App.4th at p. 1506 ["To comply with subdivision (b)(3), City Water also had to correlate its tiered prices with the actual cost of providing water at those tiered levels"].) The record is devoid of any evidence that the District undertook to determine the cost of providing water service or how that cost varies by parcel or by water consumption. Indeed, the District does not even mention the cost of service in justifying its rate. Accordingly, we conclude the District failed to carry its burden to show it is entitled to judgment on Boyd's subdivision (b)(3)-based claim.

The District stresses the importance of tiered rates to promote water conservation. We note that nothing in Proposition 218 is obviously incompatible with the use of tiered rates. Presumably, supplying excessive amounts of water increases the need for system maintenance and new water sources, thereby increasing the District's costs. (*Brydon v. East Bay Mun. Utility Dist.* (1994) 24 Cal.App.4th 178, 202 ["To the extent that certain consumers overutilize the resource, they contribute disproportionately to the necessity for conservation, and the requirement that the District acquire new sources for the supply of domestic water"].) If that is the case, subdivision (b)(3) allows the District to charge more to excessive water users to cover those higher costs. However, we cannot simply assume the District's tiered rates bear the requisite relationship to its costs.

The District also contends that this court's decision in *Griffith*, *supra*, 220 Cal.App.4th 586 supports the trial court's conclusion that the District's rates comply with subdivision (b)(3). In our view, *Griffith* is distinguishable. There, a water management agency imposed a ground water augmentation charge on all customers to cover the costs of purchasing, capturing, storing, and distributing supplemental water to a subset of those customers. (*Griffith*, *supra*, 220 Cal.App.4th at p. 598.) The water management agency submitted evidence showing it calculated the ground water augmentation charge "based

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Agency (2013) 220 Cal.App.4th 586, 601 (*Griffith*). However, some nexus between costs and the charge is required.

on a revenue-requirement model that budgeted the rates by (1) taking the total costs of chargeable activities, (2) deducting the revenue expected from other sources, and (3) apportioning the revenue requirement among the users." (*Id*. at p. 600.) In apportioning the revenue requirement, the water management agency grouped similar users together and charged them according to usage, something this court deemed "a reasonable way to apportion the cost of service." (*Id.* at p. 601.)

Griffith is distinguishable because there, the water management agency submitted evidence showing how the augmentation charge was calculated. By contrast, here the District points us to no such record evidence. Therefore, it is impossible for us to conclude that the District's increased water rates bear the requisite relationship to its cost of providing water service.

"We affirm an order granting summary [judgment or] adjudication if it is legally correct on any ground raised in the trial court proceedings." (*Kight v. CashCall, Inc.* (2011) 200 Cal.App.4th 1377, 1387; accord *Securitas Security Services USA, Inc. v. Superior Court* (2011) 197 Cal.App.4th 115, 120.) Accordingly, before reversing the trial court's order as to count 1, we must consider the other grounds raised and addressed by the parties below. The District raised one other ground for summary judgment or adjudication of count 1—that Boyd is improperly engaging in the practice of law in violation of the Business & Professions Code by representing his wife in this action. Section 6125 of the California Business & Professions Code provides that "[n]o person shall practice law in California unless the person is an active member of the State Bar." Thus, " 'persons may represent their own interests in legal proceedings, but may not represent the interests of another unless they are active members of the State Bar.' " (*Golba v. Dick's Sporting Goods, Inc*. (2015) 238 Cal.App.4th 1251, 1261.

For its contention that Boyd is acting as his wife's legal representative, the District relied on the following sentence in Boyd's complaint: "As stated in Plaintiff's Protest [Exhibit 1] dated January 30, 2013 as agent for the customer of record [my wife

Pat [Paramoure] Boyd]; on the property's water account for 5439 Soquel Drive, Assessor's Parcel Number 037-094-29, SqWD Account#028460-000, in Santa Cruz County California; states 'I am protesting the proposed water rate and the service charge increases, as violating the provisions of Proposition 26, also known as the 'Supermajority Vote to Pass New Taxes and Fees Act' (2010).' " Exhibit 1 to the complaint is the protest Boyd's wife submitted to the District regarding the rate increase in which she designated Boyd "as my agent for service in these matters."

The sentence on which the District relies certainly implies that Boyd's wife is the plaintiff or that Boyd is acting as her agent. However, the complaint's caption identifies Boyd as the sole plaintiff; the complaint refers to e-mails sent by Boyd as being sent by "Plaintiff"; and the complaint complains of violations of plaintiff's rights, not his wife's rights. We believe the complaint is best construed as asserting Boyd's own interests, not those of his wife, such that there is no violation of the Business & Professions Code. We offer no opinion as to whether Boyd has standing to sue the District, an issue not raised below.

For the foregoing reasons, we conclude the trial court erred in granting summary judgment to the District on count 1.

4. *Count 2*: *Article XIII D, Section 6, Subdivision* (*b*)(*4*)

Subdivision (b)(4) provides: "No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4." The District submitted evidence that funds from the rate increase will be used to evaluate alternative water sources, including the proposed desalination project. On appeal, Boyd

contends that the rate increase violates subdivision (b)(4) because it funds the proposed desalination plant, water from which is not immediately available to property owners.

For Boyd to prevail, we must conclude that the exploration of desalinated water as a potential future water source is a distinct "service" that is not "immediately available to" property owners. Neither case law nor statutory authority supports such a conclusion. "The Proposition 218 Omnibus Implementation Act, enacted specifically to construe Proposition 218, defines 'water' as 'any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water.' (Gov. Code, § 53750, subd. (m).)" (*Griffith, supra*, 220 Cal.App.4th at p. 595.) In *Griffith*, this court concluded, based in part on Government Code section 53750, subdivision (m), that "water service [includes] more than just supplying water." (*Griffith, supra*, at p. 595.) Rather, it includes the production, purchase, capture, storage, treatment, and distribution of water. (*Ibid*.) Given that water service includes water production, purchase, and capture, this court further concluded that "identifying and determining future supplemental water projects . . . ." is part of water service. (*Id.* at p. 602.) Under *Griffith*'s reasoning, the District's evaluation of the proposed desalination project as a future, supplemental source of water is part of its traditional water service. There is no dispute that the District's water service is immediately available. Accordingly, the rate increase does not violate subdivision (b)(4).

Boyd's reliance on *Capistrano* is misplaced. At issue in *Capistrano* was whether the City could pass along the cost of a new water recycling plant to customers. Like the proposed desalination facility at issue here, the recycling plant was not yet "on line." (*Capistrano, supra*, 235 Cal.App.4th at p. 1501.) The court held that subdivision (b)(4) "allow[s] public water agencies to pass on to their customers the capital costs of improvements to provide additional increments of water—such as building a recycling plant." (*Capistrano, supra*, at p. 1497.) The court reasoned that there was no subdivision (b)(4) violation because the provision of traditional potable water and the

provision of nonpotable recycled water were both components of the City's existing water service, which was already immediately available to all customers. (*Capistrano*, *supra*, at p. 1502.) Thus, with respect to whether the exploration of desalinated water as a potential future water source is a distinct "service" that is not "immediately available to" property owners under subdivision (b)(4), *Capistrano* supports the District, not Boyd.

The *Capistrano* court went on to conclude that Government Code section 53756 restricts a water district's ability to pass on the capital costs of improvements like recycling and desalinization facilities to customers.[7] According to *Capistrano*, "[t]he upshot" of Government Code section 53756 "is that within a five-year period, a water agency might develop a capital-intensive means of production of what is effectively *new* water, such as recycling or desalinization, and pass on the costs of developing that new water to those customers whose marginal or incremental extra usage requires such new water to be produced." (*Capistrano*, *supra*, 235 Cal.App.4th at p. 1503.) The *Capistrano* court remanded the matter to the trial court to determine "whether charges to develop [the water district's] nascent recycling operation have been improperly allocated to users whose levels of consumption are so low that they cannot be said to be responsible for the need for that recycling." (*Id.* at p. 1504.)

On appeal, Boyd quotes (without citation) the *Capistrano* court's discussion of Government Code section 53756 and appears to assert that the District violated that provision by expending more than $4 million on the desalination project between "September 23, 2007 [and] December 7, 2012 . . . [, which is] a period longer than 5

[7] Government Code section 53756 provides, in relevant part: "An agency providing water, wastewater, sewer, or refuse collection service may adopt a schedule of fees or charges authorizing automatic adjustments that pass through increases in wholesale charges for water, sewage treatment, or wastewater treatment or adjustments for inflation, if it complies with all of the following: [¶] (a) It adopts the schedule of fees or charges for a property-related service for a period not to exceed five years pursuant to Section 53755."

years as specified by California Government Code § 53756." We decline to reverse the trial court's ruling that the District is entitled to judgment on count 2 on the basis of Government Code section 53756 for two reasons. First, the complaint makes no mention of Government Code section 53756. "[T]he pleadings set the boundaries of the issues to be resolved at summary judgment." (*Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 648.) A " 'plaintiff cannot bring up new, unpleaded issues' " in opposition to a motion for summary judgment or adjudication. (*Ibid.*) Because any claim that the District violated Government Code section 53756 was not alleged in the complaint, we decline to consider whether it creates a triable issue of material fact to defeat the District's summary judgment motion. Second, the allegations in the complaint do not support Boyd's new contention that the District's expenditures occurred over a period of more than five years. In his opening brief, Boyd contends that the District's desalination expenditures began on September 23, 2007, which is the date on which the Mayor of Santa Cruz signed the Joint Agreement. But the complaint alleges that the District's $4 million in expenditures occurred between May 2008 and December 2012. A printout of the District's accounts payable, which is attached to the complaint as an exhibit, confirms that the expenditures at issue began on May 16, 2008.

In sum, the trial court did not err in concluding that the District's rate increase does not violate subdivision (b)(4).

III. DISPOSITION

The judgment in favor of the City is affirmed. The judgment in favor of the District is reversed and the matter is remanded to the trial court. On remand, the trial court is directed to vacate its order granting summary judgment to the District and to enter a new order denying the District summary adjudication on count 1 and granting the District summary adjudication on counts 2, 3, and 4.

The City shall recover its costs on appeal from Boyd. Boyd and the District shall bear their own costs on appeal.

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ELIA, ACTING P.J.

WE CONCUR:

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BAMATTRE-MANOUKIAN, J.

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MIHARA, J.